Supreme Court, U.S.
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In The

Supreme Court of the United States

MARK N. MATTHEWS,

Petitioner,

v.

MILITARY DEPARTMENT,
STATE OF LOUISIANA,

Respondent.

On Petition For A Writ Of Certiorari To The Louisiana Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the State of Louisiana has waived its sovereign immunity and conserted to the assertion of federal law claims in Louisiana state courts, pursuant to Article XII Section 10 of the Louisiana Constitution and La. R.S. 13:5106(A)?

2. Whether or not the self-care provision of the Family Medical Leave Act ("FMLA"), 29 U.S.C. § 2612(a)(1)(D) is a proper exercise of Congress' power under § 5 of the Fourteenth Amendment, thereby constituting a valid exercise of Congressional power to abrogate the state's sovereign immunity from suits by individuals?

PARTIES

The parties to this action are set forth in the caption.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Mark N. Matthews, respectfully prays that a writ of certiorari issue to review the judgment opinion of the Louisiana Supreme Court entered in this case on February 15, 2008.

OPINIONS BELOW

The September 24, 2007 judgment rendered from the Louisiana First Circuit Court of Appeal, which is not officially reported, is set forth at pp. 1a-3a of the Appendix. The October 31, 2007 order of the First Circuit denying rehearing, which is not reported, is set out at p. 4a of the Appendix. The June 13, 2007 judgment by the 19th Judicial District Court, which is not reported, is set out at p. 5a of the Appendix. The transcribed oral reasons for the trial court judgment of June 13, 2007, which are not reported, are set out at pp. 6a-7a of the Appendix. The February 15, 2008 order of the Louisiana Supreme Court denying the writ application, which is not reported, is set out a p. 8a of the Appendix.

JURISDICTION

The judgment of the Louisiana First Circuit Court of Appeal was entered on September 24, 2007. A timely petition for rehearing was denied on October 31, 2007. A timely writ application to the Louisiana Supreme Court was denied on February 15, 2008. 28 U.S.C. § 2403(a) may be applicable since the

constitutionality of an Act of Congress is at issue. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

29 U.S.C. § 2612(a)(1)(D) of the Family and Medical Leave Act ("FMLA") provides in pertinent part:

> An eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:
>
> Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

The Louisiana Constitution of 1974, Article XII, § 10(A) provides: "Neither the state, a state agency, nor a political subdivision shall be immune from liability in contract or for injury to person or property."

La. R.S. 13:5106(A) provides as follows: "No suit against the state or a state agency or political subdivision shall be instituted in any court other than a Louisiana state court."

STATEMENT OF THE CASE

This is a case in which the Petitioner, Mark N. Matthews, seeks reinstatement, damages, and related

relief arising out of the termination of his employment by the Louisiana Military Department on August 25, 1999. This case was brought in Louisiana state court pursuant to the federal Family Medical Leave Act, 29 U.S.C. §§ 2601-2654 and the Louisiana Whistleblower Statute, La. R.S. 23:967.[1]

Mr. Matthews went to work for the Louisiana Military Department on February 25, 1996. He was employed as Chief of the Division of Financial Reporting and Internal Audit.

Prior to his employment at the Military Department he was involved in a motor vehicle accident in which he injured his neck. In 1997, Dr. Randi Voorhies, a neurosurgeon with the Ochsner Clinic in New Orleans, performed surgery on Mr. Matthews consisting of a cervical disectomy and fusion at C5-6.

From January of 1998 through November of 1998, Mr. Matthews criticized officials of the Louisiana Military Department for not maintaining adequate controls over movable property, for engaging in improper procurement practices, and for not maintaining adequate controls over the disbursement of federal funds for disaster assistance programs. Mr. Matthews reported these violations of law to both his supervisors and the Louisiana Legislative Auditor's Office. As a result of Mr. Matthews' reports to the

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[1] In *Richardson v. Monitronics International, Inc.*, 434 F.3d 327 (5th Cir. 2005), the Fifth Circuit recently held that a mixed-motives analysis may be applied to FMLA claims.

Louisiana Legislative Auditor's Office, the Legislative Auditor issued a report on November 24, 1998 which was highly critical of the Louisiana Military Department.

On May 14, 1999, Mr. Matthews met with his supervisor, Col. Michael Appe. At that meeting, they discussed, among other things, a shortfall in FEMA reimbursements, inadequate controls over movable property, and improper procurement practices. Mr. Matthews continued to make similar disclosures to Col. Appe through the summer of 1999.

On July 29, 1999, Col. Appe signed a "letter of counseling" directed to Mr. Matthews which stated:

> Effective this date you are to report immediately to New Orleans and be assigned to Col. John Catalanotte. Col. Catalanotte will become your supervisor and will ensure you complete the necessary tasks that you have failed to complete on your own. You will have no direct contact with the Legislative Auditors. All of your work will be coordinated through Col. Catalanotte. Failure to comply with this directive will result in disciplinary action.

Since Mr. Matthews and his wife and children live and attend school in Baton Rouge, Louisiana, the reassignment to a New Orleans duty station necessitated that he commute daily to and from New Orleans, or relocate.

On August 9, 1999, Mr. Matthews' treating physician, Dr. Myles Gaupp, wrote the agency and

essentially requested, in light of the fact that Mr. Matthews was experiencing a significant increase in his previously manageable cervical symptoms, that his medical condition be accommodated and that he not be required to commute daily to and from New Orleans "less this develops into a more chronic situation." Mr. Matthews was never advised by his supervisors at the Military Department that this medical certification was deficient or incomplete in any way and he was never provided with any opportunity to cure any perceived deficiency.[2]

On August 18, 1999, Col. John Catalanotte wrote to Mr. Matthews. Col. Catalanotte stated that the agency had reviewed Mr. Matthews' medical documentation but that they had decided to require him to drive the daily commute anyway. Col. Catalanotte also wrote in this memorandum:

> You are hereby directed to report to Jackson Barracks in New Orleans, Louisiana on Friday, 20 August 1999. If your medical condition prevents you from traveling to New Orleans then it is suggested that you apply

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[2] Mr. Matthews contends that these omissions by the Military Department constitute actionable interference with his ability to meaningfully exercise his statutory rights to FMLA leave. *Sorrell v. Rinker Materials Corporation*, 395 F.3d 332 (6th Cir. 2005) ["pursuant to 29 C.F.R. § 825.305(d), if Rinker found Dr. Opremcak's medical certification incomplete, it had a duty to advise Sorrell of that fact and to provide Sorrell a reasonable opportunity to cure any such deficiency in the certification." *Id.* at 337]; *Conosherti v. Public Service Gas Company*, 364 F.3d 135 (3rd Cir. 2004).

> for necessary sick leave until such time you can report to duty in New Orleans. Failure to report to New Orleans on Friday, 20 August 1999, or submit appropriate sick leave application, will result in disciplinary action.

In accordance with Col. Catalanotte's directive of August 18, 1999, Mr. Matthews applied for leave from August 25, 1999 to August 27, 1999 and from August 30, 1999 to September 3, 1999 for his medical condition.

On the evening of August 19, 1999, Mr. Matthews received federal military orders to report to Lake Charles, Louisiana from Friday, August 20, 1999 through Sunday, August 22, 1999 for weekend military duty. On that same evening, Mr. Matthews faxed copies of these orders to Col. Appe. Mr. Matthews complied with these orders, making it impossible for him to report to his regular civilian duties on August 20, 1999. On August 23, 1999 Mr. Matthews returned to work for the Military Department and worked a full day on both August 23, 1999 and August 24, 1999.

On August 25, 1999, Col. Appe denied Mr. Matthews' request for leave. Col. Appe's memorandum of August 25, 1999 states that since Mr. Matthews traveled to Lake Charles to perform federal military duty, "there is no medical reason why you cannot report to your official duty station at Jackson Barracks, New Orleans, as directed." Col. Appe went on to terminate Mr. Matthews for "abandonment of position." Mr. Matthews contends that basing an adverse employment action on the exercise or attempted exercise

of FMLA leave is actionable. *Stallings v. Hussman Corporation,* 447 F.3d 1041 (8th Cir. 2006). This is particularly so when, as in the case *sub judice*, the employer's termination decision was explicitly based on an impermissable consideration such as the employee's alleged failure to provide a satisfactory medical certification. *Wilson v. Lemington Home for the Aged*, 159 F.Supp.2d 186, 195 (W.D. Penn. 2001).

Col. Appe testified in his deposition that Adjutant General Bennett C. Landreanau made the decision to terminate Mr. Matthews and, prior to his making this decision, he had been furnished Mr. Matthews' request for leave. Col. Appe testified that he did not have any idea what may have been the basis, if any, for the disapproval of Mr. Matthews' request of sick leave.

Mr. Matthews filed suit in the 19th Judicial District Court.[3] On December 14, 2006, the Defendant filed a motion for summary judgment. This motion was heard and decided on May 21, 2007. The trial court denied this motion, finding genuine issues of material fact for trial. Thereafter, the Military Department filed a supervisory writ application with the Louisiana Court of Appeal for the First Circuit. On September 24, 1997, the First Circuit granted this writ application and summarily ruled, without oral argument, that the self-care provision of the Family

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[3] The processing of this case was previously delayed considerably because of Mr. Matthews' two (2) military tours in Kuwait and Iraq and other matters beyond his control.

Medical Leave Act was unconstitutional, in violation of the Eleventh Amendment to the United States Constitution.

Both parties filed applications for rehearing, which were denied on October 31, 2007. Thereafter, Mr. Matthews applied to the Louisiana Supreme Court for writs of review. This application was denied on February 15, 2008.

REASONS FOR GRANTING THE WRIT

THE LOUISIANA SUPREME COURT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT, AND HAS DECIDED THIS FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH DECISIONS OF THIS COURT

I. The State of Louisiana has Waived its Sovereign Immunity

The constitutional issue as to whether Congress itself, as opposed to the State of Louisiana, has validly abrogated the state's sovereign immunity arises not because of any lack of authority on the part of Congress to enact the FMLA, which it clearly has under the Commerce Clause, Art. I, § 8 cl.3. Rather this constitutional issue arises because of Congress' intent to provide for its enforcement against *non-consenting* states by permitting state employees to file suits against these states for monetary damages.

See dissent of Justice Scalia in *Nevada Department of Human Resources v. Hibbs,* 538 U.S. 721, 744 (2003); see also concurrence of Justice Stevens at 741 and dissent of Justice Kennedy, joined by Justices Scalia and Thomas at 759.

This Court has consistently held that sovereign immunity may be waived and that a state may consent to suit in federal and/or state courts. This Court has required that the state's consent be "unequivocally expressed." *Pennhurst State School and Hospital v. Halderman,* 465 U.S. 89, 99 (1984).[4] But see *Lapides v. Board of Regents of the University System of Georgia*, 535 U.S. 613 (2004) in which this Court held that the state waived its Eleventh Amendment sovereign immunity when the state's attorney general removed a case to federal court. 535 U.S. 613 (2002). In *Alden v. Maine*, 527 U.S. 706, 737 (1999), this Court held " . . . we have not questioned the general proposition that a state may waive its sovereign immunity and consent to suit." The Court added at 755: " . . . sovereign immunity bars suits only in the absence of consent . . . the rigors of sovereign immunity are thus 'mitigated by a sense of justice which has continually expanded by consent the suability of the sovereign.'"

Whether or not a "particular set of state laws, rules or activities amounts to a waiver of the state's Eleventh Amendment immunity is a question of

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[4] A state's constitutional interest in immunity encompasses not merely *whether* it may be sued but *where* it may be sued. *Id.*

federal law." *Lapides v. Board of Regents of the University System of Georgia, supra* at 623; *Howlett v. Rose*, 496 U.S. 356 (1990) ["the elements of, and the defenses to, a federal cause of action are defined by federal law." *Id.* at 375.] See also *Great Northern Life Insurance Company v. Read*, 322 U.S. 47 (1944).

The historical origins of the doctrine of sovereign immunity in Louisiana law are obscure and uncertain. Pugh, "Historical Approach to the Development of Sovereign Immunity," 13 LA.L.REV. 476, 477 (1953). Professor Pugh goes on to make a persuasive case that the ancient English maxim "the king can do no wrong" did not (as of 1953) justify Louisiana courts in continuing to recognize the doctrine in Louisiana law. This is particularly so since the civil law of Louisiana, unlike the law of many other states, is not derived from English common law.

Professor Pugh's arguments were accepted by the Louisiana Supreme Court in *Board of Commissioners of the Port of New Orleans v. Splendour Shipping & Enterprises Company*, 273 So. 2d 125 (1973), in which the Court held:

> The origin of the doctrine of sovereign immunity is judicial, not constitutional. Considering the source of the doctrine and its history, there are three reasons which move us to withdraw from the Board the immunity with which the court has previously insulated it from tort suits. *It is unfair. It tends toward governmental irresponsibility. It is an unnecessary exception to the policy of the*

State of Louisiana as expressed in two Articles of our Constitution. (emphasis added).

The Eleventh Amendment provides: "Judicial power of the United States shall not be construed to extend to any suit . . . commenced or prosecuted against one of the . . . states" by citizens of another state. The reference to "judicial power of the United States" appears to limit the scope of the Eleventh Amendment to cases pending in federal courts. In several earlier decisions, this Court held that the Eleventh Amendment is inapplicable in state courts. See the citation of United States Supreme Court decisions. However, in *Alden v. Maine*, *supra*, this Court held that the doctrine of sovereign immunity applies in state courts not because it derives directly from the Eleventh Amendment, but because it is implied from the "fundamental aspect of the sovereignty which the states enjoyed before the ratification of the Constitution, and which they enjoy today . . . " and from structural principles contained in or presupposed by the body of the original Constitution. *Alden v. Maine, supra* at 713, 728. *Alden v. Maine's* historical justification for the existence of the doctrine of sovereign immunity is that "it was well established in English law that the crown could not be sued without its consent in its own courts." *Id.* at 715.

Despite uncertainty regarding the historical origins of the sovereign immunity doctrine insofar as Louisiana is concerned, these origins do not in any way suggest that sovereign immunity is absolute or

non-waivable. This Court held in *Alden v. Maine, supra* at 730, that the doctrine "inheres in the system of federalism established by constitution." Mr. Matthews respectfully submits that it would stand federalism on its head for the federal constitution to be interpreted in such a manner as to deprive a state and its people (speaking by and through their constitution) of their right to waive any sovereign immunity that has been jurisprudentially implied either from the history of England or the structure of the federal constitution. Moreover, in *Alden v. Maine, supra*, this Court added at 755 that:

> Sovereign immunity, moreover, does not bar all judicial review of state compliance with the Constitution and valid federal law. Rather, certain limits are implicitly in the constitutional principle of state sovereign immunity. The first of these limits is that sovereign immunity bars suits only in the absence of consent. Many states, on their own initiative, have enacted statutes consenting to a wide variety of suits. The rigors of sovereign immunity are thus "mitigated by a sense of justice which has continually expanded by consent the suability of the sovereign."

Mr. Matthews respectfully submits that Article XII, § 10(A) of the Louisiana Constitution and La. R.S. 13:5106(A) constitute a waiver of Louisiana's sovereign immunity as to federal substantive law claims brought in Louisiana state courts.

The Louisiana Constitution of 1974, Article XII, § 10(A) provides: "Neither the state, a state agency, nor a political subdivision shall be immune from liability in contract or for injury to person or property." La. R.S. 13:5106(A) provides as follows: "No suit against the state or a state agency or political subdivision shall be instituted in any court other than a Louisiana state court."

Article XII, § 10 expressly abrogates any common law immunity Louisiana once enjoyed. Its language is plain, unambiguous, and exception-free. Therefore, it should be applied as written. Since 1973, Louisiana courts have welcomed this constitutional waiver of sovereign immunity and have given it broad effect.[5] By its very terms, Article XII, § 10(A) is an unequivocal waiver of sovereign immunity from suits and liability in tort and contract.[6] Section 10(A) requires that Louisiana's liability and its substantive defenses

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[5] *Chamberlain v. State*, 624 So. 2d 874 (La. 1993); Robertson, *Tort Liability of Governmental Units in Louisiana*, 64 TUL.L.REV. 857, 864 (1990).

[6] An FMLA claim sounds in contract. For example, in *Knecht v. Board of Trustees*, 591 So. 2d 690 (La. 1991), in a case involving state employees, the Louisiana Supreme Court held that a promise of compensatory leave time accrued pursuant to their governmental employer's policy was a valid and enforceable contract, rather than a gratuity. The Court noted at 694 that an obligation arising out of a contract extends not only to what is expressly stipulated but also to everything that by law, equity, or custom is incidental to the particular contract.

be the same as those of similarly situated private-party defendants. See *Williams v. State*, 703 So. 2d 579 (La. 1979) in which the Louisiana Supreme Court held at 582-583:

> . . . we have consistently held that the abrogation of sovereign immunity demands that governments be limited to the substantive defenses that are available to private party defendants similarly situated. Simply stated, the abrogation of sovereign immunity necessitates the application of the law of the land equally to the sovereign and the private litigant.

See also *Rick v. State,* 630 So. 2d 1271 (La. 1/14/94) and *Segura v. Louisiana Architects Selection Board*, 362 So. 2d 498 (La. 1978).

Article XII, § 10(C) permits the Louisiana Legislature to limit or modify the extent of the liability of the state and its agencies. However, it has not done so with respect to federal claims (or any other tort or contract claims) brought in state courts.

It is well settled that once a waiver is found, it should be liberally construed. *United States v. Shaw, Administrator De Bonis Non*, 309 U.S. 495, 501 (1940); *Great Northern Life Insurance Company v. Read, supra*, to the same effect. See also Pugh, "Historical Approach to the Doctrine of Sovereign Immunity," 13 LA.L.REV. 476, 494 (1953) [" . . . the courts should by interpretation give the widest possible

effect to statutes waiving sovereign immunity in various fields."].

This Court, the Louisiana Supreme Court, and federal appellate courts, have on a number of occasions found that a state has waived its sovereign immunity for federal claims brought in state courts. For example, in *Board of Commissioners of the Port of New Orleans v. Splendor Shipping Enterprises Company, Inc., supra,* the Louisiana Supreme Court held that although the Board of Commissioners was a state agency, it was not immune from a reconventional demand filed under federal admiralty and maritime law. *Id.* at p. 20. In *Voisin's Oyster House v. Guidry,* 799 F.2d 183 (1986), the Fifth Circuit held that while La. R.S. 13:5106(A) did not waive the state's sovereign immunity from suits in federal court, the Plaintiff could bring his claims under 42 U.S.C. § 1983 "in any competent court." This obviously includes Louisiana state courts. In *Great Northern Life Insurance Company v. Read, supra,* this Court held at 55:

> The immunity may, of course, be waived . . . When the state authorizes a suit against itself to do justice to taxpayers who deem themselves injured by any exaction, it is not consonant with our dual system for the federal courts to be astute to read the consent to embrace federal as well as state courts . . .

This Court analyzed the Oklahoma section in question, noted that it is specifically referred to review by

the district and supreme courts of Oklahoma and concluded: "It is clear to us that the legislature of Oklahoma was consenting to suit in its own courts only." *Id.* In *Martin v. University of Louisville et al.*, 541 F.2d 1171 (6th Cir. 1976), the Court held at page 1175: "That a state may consent to be sued in its own courts does not necessarily imply its consent to suit in federal court," citing *Ford Motor Co. v. Department of Treasury,* 323 U.S. 459, 465 (1945) and *Soni v. Board of Trustees at the University of Tennessee*, 513 F.2d 347 (6th Cir. 2007). In *Martinez v. Texas Department of Criminal Justice*, 300 F.3d 567, 575-576 (2002), the Fifth Circuit held that the Texas Whistleblower statute's waiver of sovereign immunity waived state sovereign immunity in Texas state courts, but not in federal courts.

In *Howlett v. Rose,* 496 U.S. 356, 380-387 (1990), this Court held:

> It would also have had jurisdiction over the defendant school board if the action were based on established state common law or statutory law. A state policy that permits actions against state agencies for the failure of their officials to adequately police a parking lot and for the negligence of such officers in arresting a person on a roadside, but yet declines jurisdiction over federal actions for constitutional violations by the same persons can be based only on the rationale that such persons should not be held liable for § 1983

> violation in the courts of the State. That reason, whether presented in terms of direct disagreement, with substantive federal law or simple refusal to take cognizance of the federal cause of action, flatly violates the Supremacy Clause.

The people of the State of Louisiana and the Legislature have spoken in unmistakably clear and unequivocal terms in enacting La. Const. Art. XII § 10 and La. R.S. 13:5106(A). Mr. Matthews respectfully submits that Louisiana's waiver of sovereign immunity is significantly clearer and more explicit than Georgia's waiver of that state's immunity by its state attorney general, as found in *Lapides v. Board of Regents of the University System of Georgia*, *supra.* Mr. Matthews also respectfully submits that courts should defer to this type of democratic decision-making, rather than nullifying it. The decision of Louisiana courts in the case *sub judice* deprive Louisiana citizens of statutory rights and benefits guaranteed to them by the democratic processes of Congress and judicially compel Louisiana to embrace a 16th century outmoded royal prerogative of the English crown which the people acting through their state constitution, and, the Louisiana Legislature have squarely rejected for decades. Such a conclusion defeats the purposes of state sovereignty and will be a great blow to democratic and accountable government, unless corrected by this Honorable Court.

II. This Court's Decision in *Nevada Human Resources v. Hibbs* Should be Controlling

A. Introduction

In *Nevada Department of Human Resources v. Hibbs,* (hereinafter referred to as "*Hibbs*"), *supra*, this Court held that the Eleventh Amendment did not bar suits for money damages by state employees alleging the state's failure to comply with the family-care leave provision of the FMLA, 29 U.S.C. § 2601.

In Van Deusen, *Labor and Employment Law,* Lexis-Nexis (2007), the author states at 174-24: "*Hibbs* represents a break away from its line of cases . . . that Congress had failed to abrogate states' sovereign immunity under various employment law statutes . . . " The author adds at 174-25:

> In recent years, the Supreme Court has considered whether under the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA) and a variety of other laws, Congress effectively abrogated state sovereign immunity. In each case, the court found that congressional action was not sufficient to waive sovereign immunity.

The author concludes at 174-27:

> The majority distinguishes *Hibbs* from the Court's decisions . . . under the ADA . . . and the ADEA . . . because of the lower level of scrutiny when classifications based on race

> (strict) or sex (intermediate) are not involved . . . Coupled with all of these restrictions (FMLA limitations on scope of statutory coverage and damages), is the fact that the FMLA applies only to one aspect of the employment relationship-leave for a family or medical reason. In this way, the Court distinguished the FMLA from other anti-discrimination laws which apply to virtually all aspects to the employment relationship.

Based on its analysis of our nation's long history of sex discrimination and the heightened scrutiny given to such discrimination,[7] the United States Congress, in enacting the FMLA, expressly invoked its power under Section 5 of the Fourteenth Amendment. Congress stated that a central purpose of the Act was "to accomplish [the act's other purposes] in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimize the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis." Another purpose of the Act was "to promote the goal of equal employment opportunity

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[7] It is axiomatic that race and gender are suspect clauses under the Equal Protection Clause of the Fourteenth Amendment. *Kimel v. Florida Board of Regents,* 528 U.S. 62 (2000). When this Court identifies a governmental classification of persons as suspect or quasi-suspect, it effectively broadens the scope of congressional power to remedy or deter governmental discrimination based on that classification. *Kimel,* at 84.

for women and men, pursuant to such clause." 29 U.S.C. § 2601(b)(4) and § 2601(b)(5). In enacting the FMLA, Congress made the specific finding that "employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender." 29 U.S.C. § 2601(a)(6). This language refers to the purpose of FMLA in its entirety, not merely the "family-care" provision.

In *Hibbs,* this Court held that, in enacting the FMLA, Congress was validly acting pursuant to its enforcement authority of § 5 of the Fourteenth Amendment to "prevent and deter" unconstitutional sex discriminating, and thus Congress had the authority to abrogate state sovereign immunity.

The *Hibbs* opinion concerned the facts before it: an employee who needed leave to care for a covered family member who had a serious health condition under 29 U.S.C. § 2612(a)(1)(C) ("family-care-leave"). The *Hibbs* opinion did not expressly address the other kinds of FMLA leave: leave for the birth of a child, 29 U.S.C. § 2612(a)(1)(A); leave for the adoption of a child, 29 U.S.C. § 2612(a)(1)(D) ("self-care" or "medical care" leave). However, given the substantial body of evidence before Congress regarding sex discrimination in the provision of maternity[8] and related leaves,

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[8] The term "maternity leave" refers to a leave of absence that a woman takes from her job for birth of a child, and generally

(Continued on following page)

the express Congressional findings and purposes made by Congress in enacting FMLA, and this Court's reliance on the heightened scrutiny of sex discrimination under the Constitution, the *Hibbs* holding and analysis should apply with equal force to the self-care provision of the FMLA.

The FMLA seeks "to balance the demands of the workplace with the needs of families . . . in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons . . . on a gender neutral basis." § 2601(b)(1)&(4). By extending a right to leave on a nondiscretionary, gender neutral basis, the FMLA addresses the double edged discrimination arising from the assumption that women need more leave bias against men in the provision of family leave, and, bias against women in employment generally.

Congress clearly expressed its intent to abrogate states' sovereign immunity by defining covered "employers" to include "any public agency" as defined in the Fair Labor Standards Act. 29 U.S.C. § 2611(4).

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consists of a period of pregnancy and childbirth-related medical disability, when a woman is physically unable to work (usually 4 to 8 weeks) – followed by another period of leave when the woman is physically able to work but stays home to care for the newborn child. As a result, "maternity leave" is virtually by definition a combination of medical and family leave that is only available to women.

The Act also authorizes a private right of action against any person who "interfere[s] with, restrain[s] or den[ies] the exercise of" FMLA rights. § 2615(a)(1). FMLA remedies include equitable relief such as reinstatement, damages for lost pay and benefits *or* other actual monetary losses sustained (capped at an amount equal to 12 weeks of wages or salary for the employee), interest, fees and costs. 29 U.S.C. § 2617(a)(1)(A)(i) & (ii), (a)(1)(B), and (a)(3). If an employer's conduct was in bad faith and was not based on a reasonable interpretation of the Act, the employer may also be liable for additional, liquidated damages in an amount equal to the total wages, costs plus interest. § 2617(a)(1)(A)(iii).

B. The FMLA Self-Care Provision is Appropriate Legislation Enacted Pursuant to Section 5 of the Fourteenth Amendment

As previously noted, Congress in enacting the FMLA expressly invoked its power to enforce the Fourteenth Amendment. See *Hibbs, supra,* 123 S.Ct. 1976-1977. In *Hibbs,* this Court noted: "The clarity of Congress' intent here is not fairly debatable." 123 S.Ct. at 1977. Since the enactment of the FMLA was designed to prevent or deter gender discrimination pursuant to § 5 of the Fourteenth Amendment, the FMLA validly abrogates Eleventh Amendment immunity. In *Hibbs,* the late Chief Justice Rehnquist, writing for the majority, held at 1977:

> Congress may not abrogate the States' sovereign immunity pursuant to its Article I power over commerce. . . . Congress may, however, abrogate the States' sovereign immunity through a valid exercise of its § 5 power for the Eleventh Amendment, and the principle of state sovereign immunity which it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment. . . . In other words, Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct.

Because the FMLA seeks to prevent and deter unconstitutional sex discrimination at one of its most persistent focal points – the intersection of work and family – it lies at the core of Congress' § 5 authority. As this Court held in *Turner Broadcasting Systems, Inc. v. FCC,* 520 U.S. 180, 196 (1997): "Deference must be accorded to [Congress'] findings as to the harm to be avoided and to the remedial measures adopted to that end . . . " See also the[9] dissent in *Kazmier v. Widmann*, 225 F.3d 519, 537 (5th Cir. 2000). In *City of Boerne v. Flores,* 521 U.S. 507, 531-532 (1997),

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[9] The rationale of the opinion as to the constitutionality of the FMLA, as expressed by the dissent in *Kazmier v. Widmann, supra,* effectively became the rationale of the United States Supreme Court in *Hibbs, supra.* See 538 U.S. 725 which cited the previous split in circuits, exemplified by the Fifth Circuit's majority decision in *Kazmier v. Widmann, supra,* as motivating this Court's grant of certiorari in *Hibbs.*

this Court held: "Judicial deference, in most cases, is not based on the state of legislative record Congress compiles but on due regard for the decision of the body constitutionally appointed to decide." See also *Oregon v. Mitchell,* 400 U.S. 112, 207 (1970). The courts should accord deference to Congress' chosen means of addressing the problem of sex discrimination in the workplace. It should be the role of Congress "to assess and weigh the various conflicting considerations – the risk of pervasiveness of the discrimination in governmental services ... the adequacy or availability of alternative remedies," *Katzenbach v. Morgan,* 384 U.S. 641, 653 (1966), and to use any "rational means" to effectuate the constitutional prohibition against sex discrimination. *McCullough v. Maryland,* 17 U.S. 316, 421 (1819); *South Carolina v. Katzenbach,* 383 U.S. 301, 324 (1966).

C. The Provisions of the FMLA Were Interdependently Necessary to Effectuate Congress' Purpose to Deter and Prevent Unconstitutional Sex Discrimination

Subsections (C) and (D) of the FMLA should be viewed in context and as parts of a larger statutory scheme created to deter and prevent sex discrimination in the workplace. As the dissent stated in *Kazmier v. Widmann, supra,* at 544:

> The FMLA is a comprehensive, reticulated statute that prohibits and requires a synergism of constitutional employment practices as a rational means of deterring the difficult

> and intractable evils of governmental and private gender based discrimination in employment. Although a principal goal of the FMLA is to deter sex discrimination against male and female employees in granting leave time, the statute also addresses a complex of inextricably related issues and side effects, such as, gender discrimination based on sexual stereotypes, counterbalancing of perceived inequities and incentives to discriminate, and the ramifications of the legislation for children and families. As the majority concedes, it had no authority to support its atomistic interpretive methodology by which it parses the statute into subsections, examines each in isolation, and requires that each be based on its own separate evidentiary predicate. Proceeding as the proverbial blind men examining an elephant's parts my colleagues fail to discover the true nature of the creature as a whole. As discussed *infra,* the remedies implemented by the FMLA are not distinct, but rather were found interdependently necessary as a whole to effectuate Congress' stated purpose to deter and prevent unconstitutional discrimination.

In the recent decision of *Gonzales v. Reich,* 545 U.S. 1 (2005), this Court upheld the constitutionality of the Comprehensive Drug Abuse Prevention and Control Act, 21 U.S.C. § 801 *et seq.*, against a states-rights constitutional attack by the State of California. This Court held at 545 U.S. 21: "As we have done many times before, we refuse to exercise individual components of the larger scheme." This Court added

at 21: "Where the class of activities is regulated and that class is within the reach of federal power, the Courts have no power to exercise, as trivial, individual instances of the class."

D. The Ample Record of Unconstitutional Sex Discrimination by the States and the Risk of Future Discrimination Confirms the Constitutional Basis for the Enactment of the Self-Care Provision of the FMLA

In *Hibbs*, *supra*, this Court examined the extensive legislative evidence of sex discrimination in the provision of personal medical leave by the states on which Congress relied in enacting the FMLA. This Court noted at 538 U.S. 730 that, according to the legislative record, the states continued to rely on invalid gender stereotypes in the administration of leave benefits. This Court also noted at 730, n. 3, "leave policies available to public sector employees differ little from those offered by private sector employees." At 730, n. 3, this Court cited this testimony as a sufficient basis for congressional reliance on data about private employers' administration of leave benefits. This Court added: "Against the above backdrop of limited state leave policies . . . Congress was justified in enacting the FMLA as remedial legislation." This Court concluded at 1981: "In sum, the states record of unconstitutional participation in, and fostering of, gender-based discrimination in administration of leave benefits is weighty enough to justify the enactment of prophylactic legislation."

Congress made an explicit finding that the discriminatory provision of maternity leave – which is, in substantial part, a form of personal medical leave – leads to patterns of unconstitutional discrimination against women in hiring and promotion. Congress feared that providing family medical leave rights only to women would "have serious potential for encouraging employers to discriminate against them." 29 U.S.C. § 2601(a)(6). Chief Justice Rehnquist noted at 730, n. 3 that "the lack of written paternal and maternal leave policies in the workplace has created an environment in which [sex] discrimination is *rampant.*" (emphasis supplied). Congress found that while "maternity leave" policies and practices disadvantage men, they disadvantage women as well. Such a distinction in treatment on the basis of gender fosters traditional gender roles (suggesting that women, but not men, should stay home when babies are born) and require that employees give leave benefits to their (pregnant) female, but not to their male employees. As a result, they provide employers with very concrete monetary incentives to disfavor women in hiring and promotion. *Id.*

Congress also made an explicit finding that its prior attempts to address this "rampant" discrimination through the enactment of the Pregnancy Discrimination Act (hereinafter "PDA"), § 701 of the Civil Rights Act of 1964 had failed. With the evidence of unabated pregnancy based discrimination by employers who were subject to the PDA, Congress had good reason to believe that its prior attempts to address

the problem through merely prohibiting discrimination had been ineffectual.

These findings strongly suggest that there is a sufficient basis in the legislative record for Congress' reasonable conclusion that the most appropriate way to prevent and deter this "rampant" discrimination was to broaden the provision of medical leave beyond pregnancy to all disabling medical conditions on a gender-neutral basis. The FMLA is a remedy for and prophylactic against states' different treatment of men and women based on sex-based stereotypes about men's role as breadwinner and women's role in tending to the family. Since the congressional purpose of the FMLA is to prevent or deter sex discrimination, the medical leave provision rationally achieves this purpose by providing for a 12-week unpaid medical leave for serious medical needs on a gender-neutral basis. See also the dissent in *Kazmier v. Widmann, supra,* at 545.

Therefore, the *Hibbs* decision strongly suggests the conclusion that Congress acted well within its authority under Section 5 of the Fourteenth Amendment in enacting FMLA's self-care provision.

E. The Self-Care Provision of the FMLA is a Congruent and Proportional Response to Congress' Findings of Sex-Based Discrimination in the Administration of Leave Benefits

In *City of Boerne v. Flores,* 521 U.S. 507, 518 (1997), this Court held: "There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."

Mr. Matthews respectfully submits that Congress' solution to the problem of sex-based discrimination in the administration of leave benefits – the provision of no more than 12 weeks annually of unpaid medical leave – is congruent and proportional.

This Court's requirement that a Section 5 remedy be congruent and proportional is designed to assure that Congress legislates in accordance with the Court's interpretation of the constitutional right, and does not substantively redefine the right. See *Kimel v. Florida Board of Regents,* 528 U.S. 62, 81 (2000); *Boerne, supra,* at 520. The standard asks whether the contours of the statutory right are drawn in a way that is appropriately related to the underlying right it seeks to enforce (congruence) and whether the scope of its applicability accords with the scope and gravity of the targeted unconstitutional conduct (proportionality).

In *Hibbs,* this Court found that the family-care leave provision of the FMLA is "congruent and proportional to the targeted violation." In so finding, this

Court analyzed the statute, particularly its enforcement provisions, at 123 S.Ct. 735 *et seq.* and concluded that the family-care leave provision "is congruent and proportional to its remedial object, and can 'be understood as responsive to, or designed to prevent unconstitutional behavior.'" *Id.* at 737. These same findings should apply to the self-care provision of the Act, particularly since the Act contains the same enforcement mechanisms for both the family care and self-care provisions. Thus, Congress had a firm foundation for enacting this prophylactic legislation requiring the provision of medical leave for the serious health needs of both fathers and mothers, pursuant to Section 5 of the Fourteenth Amendment. The self-care provision clearly achieves this purpose by effectively providing that no public employer can discriminate on the basis of sex in the granting of medical leave.[10]

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[10] In *Hibbs*, at 740, n. 12, the late Chief Justice Rehnquist observed that Justice Kennedy's dissenting opinion at 123 S.Ct. 1972 recognizes that providing more leave to women than men "might run afoul of the Equal Protection Clause or Title VII."

THE LOUISIANA SUPREME COURT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW IN A WAY THAT IS IN CONFLICT WITH DECISIONS OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH AND FOURTH CIRCUITS

The United States Court of Appeals for the Fifth Circuit has not yet ruled in a post-*Hibbs* case whether the self-care provision of FMLA validly abrogates Eleventh Amendment immunity. *Kazmier v. Widmann,* 225 F.3d 519 (5th Cir. 2000), is a pre-*Hibbs* case which has been overruled. In a post-*Hibbs* case, *Modica v. Taylor,* 465 F.3d 174, 183 (2006), the Fifth Circuit explicitly held that its previous decision in *Kazmier v. Widmann, supra*, was "abrogated by *Hibbs*."

The Fourth Circuit and the Eleventh Circuit, in post-*Hibbs* decisions, have ruled that the self-care provision does validly abrogate sovereign immunity. *Montgomery v. Maryland,* No. 02-1998, 72 Fed. Appx. 17 (4th Cir. 2003); *Bylsma v. United States,* 346 F.3d 1324 (11th Cir. 2003). In *Bylsma v. United States, supra*, the Eleventh Circuit reversed the portions of the district court's judgment, reported at 127 F.Supp.2d 1211, 1234, that had held that the FMLA self-care provision did not validly abrogate Eleventh Amendment immunity. In *Montgomery v. Maryland, supra*, the Fourth Circuit reversed its own pre-*Hibbs* ruling in the same case. *Montgomery v. Maryland, supra*, is also a self-care case. See the facts reported

at 266 F.3d 334 (4th Cir. 2001). After the Fourth Circuit rendered its initial decision, this Court granted Montgomery's petition for certiorari, vacated the original circuit decision, and remanded for reconsideration in light of *Lapides v. Board of Regents of University System of Georgia, supra*. On remand, the district court reinstated its prior order and Montgomery again appealed. The Fourth Circuit held at 72 Fed. Appx. 17: "sovereign immunity does not protect the states in FMLA actions," citing *Hibbs*.

However, the majority of the federal circuit courts have ruled that the self-care provision of the FMLA did not validly abrogate sovereign immunity. See for, e.g., *Brockman v. Wyoming Department of Family Care,* 342 F.3d 1159 (10th Cir. 2003), *cert. denied,* 540 U.S. 1219 (2004), *Miles v. Bellfontaine Habilitation Ctr.*, 481 F.3d 1106 (8th Cir. 2007); *Touvell v. Ohio Department of Mental Retardation and Development Disabilities,* 422 F.3d 392 (6th Cir. 2005), *cert. denied,* 546 U.S. 1173 (2006).

Therefore, this case also presents a mature and clearly recognized inter-circuit conflict, regarding the constitutionality of the self-care provision of the FMLA, this conflict should be resolved by this Court.

Alternatively, even *if* the State of Louisiana has not consented to suit in its own state courts and even *if* the Eleventh Amendment bars Mr. Matthews' damage claims, Mr. Matthews should nevertheless be allowed to bring an action against state officials for

injunctive relief-including reinstatement and attorneys fees under *Ex Parte Young*, 209 U.S. 123 (1908). *Nevada Department of Human Resources v. Hibbs, supra,* dissenting opinions of Justices Kennedy, Scalia and Thomas at 759; *Hander v. San Jacinto Junior College*, 519 F.2d 273, 277 (5th Cir. 1975) and *Warnock v. Pecos County, Texas*, 88 F.3d 341, 343 (5th Cir. 1996).

THE QUESTIONS PRESENTED ARE IMPORTANT

There are several reasons why the legal issues presented by this petition are of paramount public importance for workers and their families throughout the United States.

The Louisiana Court of Appeal for the First Circuit declared an act of the United States Congress, the self-care provision of the Family Medical Leave Act ("FMLA"), 29 U.S.C. § 2612(a)(1)(D), to be unconstitutional in violation of the Eleventh Amendment to the United States Constitution. The Louisiana Court of Appeal reached this conclusion summarily, without full briefing on this issue and with almost no analysis. Indeed, the Louisiana court did not even cite or discuss the decision of this Court in *Hibbs, supra*, nor did it address the need for enforcement of the FMLA against state employers.

As the testimonials gathered by the Department of Labor earlier this year attest, employees need and value the time they are provided by the FMLA for recovery from their own serious health conditions. *The Family and Medical Leave Act: A Report on the Request for Information 2007 Update*, U.S. Department of Labor (June 2007) (available at http://www.dol.gov/esa/whd/fmla2007report.htm).[11] Employees with all types of serious health conditions credit the FMLA with giving them the time to recover from their illnesses, concentrate on their recovery, and not worry about whether they would lose their jobs because of their need to leave. *Id.* at 1-2 ("As a cancer survivor myself, I cannot imagine how much more difficult those days of treatments and frequent doctor appointments would've been without FMLA. I did my best to be at work as much as possible, but chemotherapy and radiation not only sap the body of energy, but also take hours every day and every week in treatment rooms." An Employee Comment, Doc. 5798, at 1. "I can get sick at any time and need brain surgery. This can put me out of commission for a month or two. FMLA gives me the peace of mind that I cannot be fired after I have been in a job for over a year. I cannot stress how monumental that assurance is." An Employee Comment, Doc. 159, at 1).

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[11] Petitioner gratefully acknowledges the contribution of the National Partnership for Women and Families in connection with the provision of information upon which certain of the arguments in this section are based, with their permission.

Since 1993, FMLA leave has been used by well over 50 million employees. Cantor, et al., *Balancing the Needs of Families and Employers: The Family and Medical Leave Surveys*, U.S. Dep't. of Labor (2000) (available at http://www.dol.gov/esa/whd/fmla/fmla/main2000.htm) 2-2. There are over five million full- and part-time state employees in the United States. State Government Employment and Payroll, March 2006 http://www.census.gov/gov/www/apesst06view.html. There are close to 100,000 state employees in Louisiana. *Id.* These workers are responsible for the basic governmental tasks that allow the State to perform its essential functions, including police work, water and sewage cleaning, maintenance of parks, and other necessary governmental acts. Like all employees, state employees, on occasion, need leave to care for their own serious health conditions, including time off for pregnancy-related disability leave. For employees working hard to balance their responsibilities for their work, their own health, and the health of their families, the FMLA offers critical assistance for guaranteeing unpaid job-protected leave for public employees and employees of employers with over fifty (50) employees.

In states like Louisiana, however, other than the rights granted by the FMLA, there is no right to job-protected leave for a serious illness, other than a provision allowing female employees a reasonable amount of pregnancy-related disability leave. La.R.S. 23:341-342. In other words, Louisiana state law contains *exactly* the type of one-sided leave provision

that Congress recognized would be harmful to women's employment opportunities, because it provides an economic disincentive for employers to hire women. Thus, in Louisiana, the FMLA is essential for state employees both to allow them to recover from their own serious illnesses and to correct the disincentive created by Louisiana's own pregnancy-related disability leave statute.

Money damages are an integral part of the enforcement of the FMLA. Clearly, Congress believed that such damages were important to compensate victims and to dissuade employers from violating the law. While state employees may be able to sue their employers for injunctive relief, injunctive relief alone does not fully compensate a victim and may be inappropriate in a given case. Congress intended monetary damages to be available for state employees. This Court should settle this important unresolved issue of federal constitutional law and determine whether that intent of Congress will be given effect.

A full and correct application of the rationale, findings, and analysis set forth by this Court in *Hibbs* and a review of the legislative history of the FMLA will show that Congress acted to create leave for both self-care and family-care in a way that would support women and families in the workplace and prevent and deter gender discrimination against women. Given Congress' interest in limiting gender discrimination in the workplace, this Court should grant this petition so

that the Louisiana courts' erroneous decisions can be corrected.

CONCLUSION

For the above reasons, a writ of certiorari should issue herein to review the judgment and opinion of the Louisiana Supreme Court. In addition, the Solicitor General should be invited to file a brief expressing the views of the United States.

Respectfully submitted,

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DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2007 CW 1337

MARK N. MATTHEWS

VS.

THE MILITARY DEPARTMENT
FOR THE STATE OF LOUISIANA

* * *

JUDGMENT RENDERED: SEP 24 2007

* * *

ON APPEAL FROM THE
19TH JUDICIAL DISTRICT COURT
DOCKET NUMBER 475,707 DIVISION "N"
PARISH OF EAST BATON ROUGE,
STATE OF LOUISIANA

HONORABLE A.J., KLING, JUDGE AD HOC

* * *

	ATTORNEY FOR
Scott G. Vincent, Assistant Attorney General	Counsel for Appellant/ Defendant Military Department for the State of Louisiana
J. Arthur Smith, III	Counsel for Appellee/ Plaintiff Mark N. Matthews

BEFORE: GAIDRY, McDONALD
AND McCLENDON, JJ.

PER CURIAM:

WRIT GRANTED IN PART; WRIT DENIED IN PART. The trial court's judgment dated June 13, 2007, denying the Exception of Lack of Subject Matter Jurisdiction and No Cause or Right of Action, or in the Alternative, Motion for Summary Judgment filed on behalf of the Military Department for the State of Louisiana is reversed to the extent that the trial court denied the exception/motion relative to the claim asserted under the Family Medical Leave Act and the whistleblowing claim concerning the State's acquisition of the Gillis Long Hansen Disease Center. Plaintiff cannot proceed with his action under the self-care provision pursuant to 29 U.S.C. §2612(a)(1)(D) of the Family Medical Leave Act insofar as Congress in adopting subsection (a)(1)(D) of the Act did not validly abrogate Louisiana's Eleventh Amendment sovereign immunity. *See* **Brockman v. Wyoming Dept. of Family Servs.**, 342 F.3d 1159 (10th Cir. 2003), *cert. denied,* 540 U.S. 1219, 124 S.Ct. 1509, 158 L.Ed.2d 155 (2004). We also find that plaintiff is afforded no protection under La. R.S. 23:967 or 30:2027 for his reports relative to the State's potential liability for acquisition of the Gillis Long Hansen Disease Center insofar as the reports were required as part of his normal duties. *See* **Sasse v. U.S. Dept. of Labor**, 409 F.3d 773 (6th Cir. 2005). Also, plaintiff's allegations relative to the Gillis Long Hansen Disease Center indicate that plaintiff was

merely expressing his concerns about the State's potential liability in acquiring same, which concerns do not amount to whistleblowing. Moreover, plaintiff does not allege that he attempted to disclose or threatened to disclose State activity relative to the acquisition of the Gillis Long Hansen Disease Center that he reasonably believed to be in violation of an environmental law, rule, or regulation. *See* La. R.S. 30:2027(A)(1).

Accordingly, we grant the exception of no cause of action filed by the Military Department for the State of Louisiana and dimiss plaintiff's claims asserted under the Family Medical Leave Act and the whistleblowing claim in regard to the State's acquisition of the Gillis Long Hansen Disease Center. The writ is denied insofar as it seeks dismissal of plaintiff's whistleblower claims relative to the State's mishandling of hurricane funds.

STATE OF LOUISIANA

COURT OF APPEAL, FIRST CIRCUIT

MARK N. MATTHEWS NO. 2007 CW 1337

VERSUS

THE MILITARY DEPARTMENT
FOR THE STATE OF LOUISIANA OCT 31 2007

In Re: Mark N. Matthews, applying for rehearing, 19th Judicial District Court, Parish of East Baton Rouge, No. 475, 707.

BEFORE: GAIDRY, McDONALD AND McCLENDON, JJ.

APPLICATION FOR REHEARING DENIED.

PMc
EJG
JMM

COURT OF APPEAL, FIRST CIRCUIT

/s/ Elizabeth D. Navta
DEPUTY CLERK OF COURT
FOR THE COURT

MARK N. MATTHEWS	**DOCKET NO. 475, 707 DIV. "N"**
VERSUS	**19TH JUDICIAL DISTRICT COURT**
THE MILITARY DEPARTMENT STATE OF LOUISIANA	**PARISH OF EAST BATON ROUGE STATE OF LOUISIANA**

JUDGMENT ON EXCEPTIONS AND MOTION FOR SUMMARY JUDGMENT

(Filed Jun. 6, 2007)

The Exception of Lack of Subject Matter Jurisdiction and No Cause or Right of Action or, in the Alternative, Motion for Summary Judgment filed herein by the Military Department for the State of Louisiana came on for hearing on May 21, 2007.

PRESENT: J. Arthur Smith, III for the plaintiff, Mark N. Matthews, Scott G. Vincent for the defendant, Military Department for the State of Louisiana.

Considering the law and the evidence and for oral reasons assigned,

IT IS ORDERED, ADJUDGED AND DECREED that the Exception of Lack of Subject Matter Jurisdiction and No Cause or Right of Action is hereby overruled.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant's alternative Motion for Summary Judgment is hereby denied.

JUDGMENT RENDERED this 21st day of May, 2007.

JUDGMENT READ AND SIGNED this 13 day of ~~May~~, June 2007.

/s/ A.J. Kling, J.
JUDGE AD HOC A.J. KLING,
19TH JUDICIAL DISTRICT COURT

RESPECTFULLY SUBMITTED:

/s/ J. Arthur Smith, III
J. Arthur Smith, III
Attorney for Mark N. Matthews
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Baton Rouge, LA 70802
(225) 383-7716

LEGISLATION, THAT JUSTIFIES THE STATUTE.

I WOULD RESPECTFULLY SUBMIT TO THE COURT THAT THIS STATUTE CLEARLY DOES PREVENT AND DETER SEX DISCRIMINATION IN THE SELF CARE PROVISIONS FOR SEVERAL REASONS, NUMBER ONE IS THAT CONGRESS SOUGHT TO MAKE A 12 WEEK ACROSS THE BOARD FIXED AMOUNT OF LEAVE THAT COULD BE TAKEN FOR SERIOUS HEALTH NEEDS BY EITHER MAN OR WOMAN; IT CREATED A FIXED BENEFIT. THE HIBBS CASE SUGGESTED, FOOTNOTE 12, THAT IF CONGRESS HADN'T DONE THAT, IF IT CREATED MORE BENEFITS FOR WOMEN THAN FOR MEN, THEN THAT WOULD HAVE CREATED AN EQUAL PROTECTION PROBLEM. JUDGE DENNIS IN HIS DISSENT IN THE KAZMIER CASE NOTES THAT THE LEGISLATIVE RECORD IS SHOWING THAT MEN RECEIVED WHAT HE CALLS "NOTORIOUSLY DISCRIMINATORY TREATMENT IN LEAVE REQUESTS." SO THIS STATUTE, THIS SUBSECTION, THE SELF CARE SUBSECTION, CLEARLY REMEDIES THAT DISCRIMINATION IN THE ADMINISTRATION OF LEAVE BENEFITS.

THIS STATUTE ALSO DEALS WITH LEAVE FOR MATERNITY/DISABILITY. IF YOU LOOK AT 4(B) OF THE FINDINGS AND PURPOSES, YOU SEE THE REFERENCE TO MATERNITY RELATED DISABILITY. WELL, THAT DEALS WITH A SITUATION WHERE THE MOTHER HAS A COMPLICATION, A HEALTH COMPLICATION OF THE

PREGNANCY. IT'S SOMETHING THAT SHE HAS TO DEAL WITH HER OWN BODY, SO TO SPEAK, NOT THE HEALTH OF THE CHILD AND THAT IS A SELF CARE PROVISION OF THE STATUTE.

ALSO –

THE COURT: I THINK I HAVE A GRASP OF WHAT'S INVOLVED HERE AND I THINK YOU HAVE AN UPHILL BATTLE IN THIS CASE, BUT BASED ON THE JURISPRUDENCE AND MY INTERPRETATION OF THE STATUTE, THE COURT BELIEVES THAT THIS IS A CASE THAT SHOULD GO TO TRIAL AND I WILL OVERRULE THE EXCEPTIONS AND THE MOTION FOR SUMMARY JUDGMENT. I BELIEVE THAT THERE WILL BE DIFFICULTY ON THE MERITS FROM YOUR STANDPOINT, FROM YOUR CLIENT'S STANDPOINT, IN THE QUESTION OF WHETHER OR NOT THERE WERE ADVERSE CONDITIONS; THE TIME FACTOR, I THINK, WILL BE VERY SERIOUS; CONSTITUTIONALITY I THINK IS STILL AN OPEN QUESTION. I THINK YOUR ARGUMENTS ARE CORRECT AS FAR AS THEY GO, BUT I DON'T THINK IT'S GOING TO BE AN EASY CASE TO WIN. NEVERTHELESS, THE RULING OF COURT IS THAT THE EXCEPTIONS ARE OVERRULED. YOU PREPARE A JUDGMENT AND I'LL SIGN IT WHEN I GET IT.

The Supreme Court of the State of Louisiana

MARK N. MATTHEWS

VS. NO. 2007-CC-2316

THE MILITARY DEPARTMENT FOR THE STATE OF LOUISIANA

IN RE: Matthews, Mark N.; – Plaintiff; Applying for Supervisory and/or Remedial Writs, Parish of E. Baton Rouge, 19th Judicial District Court Div. N, Nos. 475, 707; to the Court of Appeal, First Circuit, No. 2007 CW 1337

February 15, 2008

Denied.

JLW

PFC

CDK

JPV

CDT

JTK

JOHNSON, J., would grant.

Supreme Court of Louisiana
February 15, 2008

/s/ Katherine A. Fontana
Deputy Clerk of Court
For the Court

04

No. 07-1435

FILED
JUN 5 - 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

MARK N. MATTHEWS,

Petitioner,

v.

THE MILITARY DEPARTMENT,
STATE OF LOUISIANA,

Respondent.

On Petition For A Writ Of Certiorari
To The Louisiana First Circuit Court Of Appeal

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The issues presented for review are as follows:

1. Whether Congress exceeded its authority in enacting the self-care provision of the Family Medical Leave Act ("FMLA") as this provision applies to the states?

2. Whether the State of Louisiana waived its sovereign immunity by the adoption of Article XII, Section 10 of the Louisiana Constitution and LSA-R.S. 13:5106(A)?

PARTIES TO THE PROCEEDINGS

The parties to this action are set forth in the caption.

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CITATION OF ORDERS UNDER REVIEW

The substantive ruling of which Petitioner seeks review is the opinion issued by the Louisiana First Circuit Court of Appeal on September 24, 2007 in the proceedings entitled "Mark N. Matthews v. The Military Department for the State of Louisiana," bearing no. 2007 CW 1337 on the docket of said court, dismissing the claims asserted under the Family Medical Leave Act ("FMLA").[1] Petitioner applied for a rehearing, which was denied by Order issued on October 31, 2007. He then applied to the Louisiana Supreme Court for a writ of certiorari, but his application was denied on February 15, 2008. Contrary to Petitioner's representation that these rulings are not reported, each of these Rulings is reported in the Southern Reporter. *See Matthews v. Military Dept. ex rel. State,* 970 So.2d 1089 (La. App. 1st Cir. 2007), *writ denied,* 976 So.2d 177 (La. 2008). The Opinions are reproduced in Petitioner's Appendix to his Petition for Writ of Certiorari.

---

[1] The Ruling further dismissed a claim assented under the Louisiana Whistleblower Act. Petitioner has not sought a review of the dismissal of his Whistleblower claim, so that portion of the Ruling is not subject to review in the present proceedings.

STATEMENT OF JURISDICTION

Petitioner bases the Court's certiorari jurisdiction over the present matter on 28 U.S.C. § 1254(1), which provides as follows:

> **§ 1254. Courts of appeals; certiorari; certified questions**
>
> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
>
> (2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

By its terms, 28 U.S.C. § 1254 applies only to "[c]ases in the courts of appeal." The matter sought to be reviewed in these proceedings is a ruling issued by the Supreme Court of Louisiana. For this reason, 28 U.S.C. § 1254(1) does not confer jurisdiction over the present matter.

28 U.S.C. § 1257 provides for the review by this Court of "final judgments or decrees" issued by a state's highest court "where the validity of a treaty or

statute of the United States is drawn in question." In this regard, 28 U.S.C. § 1257 provides as follows:

> **§ 1257. State courts; certiorari**
>
> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.
>
> (b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

Since the ruling at issue in these proceedings does not constitute a "final judgment," 28 U.S.C. § 1257 likewise does not confer jurisdiction over this matter.

STATEMENT OF THE CASE

The present litigation centers on plaintiff's claim that he was terminated from his employment with the Military Department for the State of Louisiana (hereinafter sometimes referred to as "the Military

Department") in violation of the FMLA and Louisiana's whistleblower statutes, LSA-R.S. 23:967 and LSA-R.S. 30:2027. His claims are summarized more fully in the following paragraphs.

Plaintiff, Mark Matthews ("Matthews"), alleges he was hired as an accountant/assistant fiscal officer for the Military Department on February 25, 1996.[2] On November 21, 1997, Matthews reported to his supervisor, Colonel Michael Appe of the Adjunct General's Office, significant errors and omissions committed by the Office of Emergency Preparedness, a branch of the Military Department, concerning the State's disbursement of disaster relief funds in the wake of Hurricane Andrew, which had resulted in the loss of $8.5 million in federal funding reimbursements. Throughout 1998, Matthews cooperated with the Legislative Auditor's Office in its investigation into the matter. The auditor's report, issued on November 24, 1998, was highly critical of the Department with respect to the manner in which it had disbursed disaster relief funds to hurricane victims.

---

[2] Throughout the remainder of the Brief, as references are constantly made to allegations contained in the Petition, the writer will not burden the reader with the continuous and repetitive use of the phrases "alleged," "allegedly," "allegations," and similar phraseology when referring to allegations made in the Petition. By not constantly using these phrases, defendant/respondent in no way admits the allegations contained in the Petition.

On June 14, 1999, Colonel Appe reassigned Matthews to the Jackson Barracks, effective July 9, 1999, supposedly in retaliation for his comment concerning the State's handling of the hurricane relief funds. The commute between Baton Rouge and New Orleans proved intolerable for Matthews, who had previously undergone a cervical fusion. On August 13, 1999, Matthews notified Colonel Appe of the potential environmental liability on the part of the State of Louisiana that might be faced because of biochemical waste stored at the Gillis Long Hansen Disease Center located in Carville, Louisiana (hereinafter referred to as "the Disease Center") once the custody of the facility was transferred from the federal government to the State of Louisiana. At this time, Colonel Appe directed plaintiff to discuss any further employment issues with Colonel John Catalonette.

Matthews met with Colonel Catalonette on August 18, 1999 to discuss his treating physician's written recommendation that he discontinue the daily commute to New Orleans on account of his back condition. Notwithstanding the doctor's note, Colonel Catalanotte instructed Matthews to report to duty at the Jackson Barracks on August 20, 1999 and suggested to him that if his back condition prevented him from commuting, he should take sick leave until such time as the condition resolved itself. Matthews received orders on August 19, 1999 to report for military duty in Lake Charles for the period of August 20-22, 1999. In accordance with Colonel Catalanotte's suggestion, Matthews took sick leave on

August 24, 1999. Colonel Appe terminated Matthews on August 25, 1999 in retaliation for his whistleblowing activities and the exercise of his right to leave under FMLA.

Defendant filed an Exception of Lack of Subject Matter Jurisdiction and No Cause or Right of Action, or in the Alternative, Motion for Summary Judgment ("Exception/Motion") on December 1, 2006. The affidavit, employment records, and deposition excerpts filed in support of the Motion for Summary Judgment make it abundantly clear that Matthews was terminated solely because of his repeated refusal to obey direct orders – issued on June 14, July 29, and August 18 and 24 – to report to duty at the Jackson Barracks. With respect to plaintiff's FMLA claim, the Exception/Motion asserted, amongst other arguments/defenses, that Congress exceeded its authority in enacting the self-care provision of the FMLA and that the provision is unconstitutional as applied to the states.

The Exception/Motion was presented to the trial court on May 21, 2006. At the commencement of plaintiff's argument, the ad hoc judge asked plaintiff's counsel to explain how Matthews's alleged whistleblowing could have caused his termination when his termination occurred almost two years after his claimed whistleblowing activities. Rather than addressing the court's question, plaintiff's counsel began a lengthy dissertation as to why, notwithstanding the jurisprudence of virtually every federal circuit court that has addressed the issue to the contrary, the

Eleventh Amendment does not bar an action under the FMLA's self-care provision against a state. Midway through this dissertation, the trial judge interrupted plaintiff's presentation and ruled that the Exception/Motion was denied. Neither the court nor plaintiff's counsel addressed the remaining defenses raised in the Exception/Motion.

The Military Department filed a Writ of Certiorari with the Louisiana First Circuit Court of Appeal. By Ruling issued on September 24, 2007, the Louisiana First Circuit Court of Appeal dismissed the FMLA claims on the basis that the self-care provision does not constitutionally apply to the states. The court further dismissed plaintiff's whistleblower claim relative to the State's potential liability for acquisition of the Gillis Long Hansen Disease Center based on its conclusion that the plaintiff had a duty to report the alleged illegal activities and therefore was not a "whistleblower." *See Matthews v. Military Dept. ex rel. State,* 970 So.2d 1089 (La. App. 1st Cir. 2007). Plaintiff sought a rehearing, which was denied, and later filed a petition for writ of certiorari with the Louisiana Supreme Court, which was also denied. *See* 976 So.2d 177 (La. 2008). Petitioner filed his Petition for Writ of Certiorari before this Honorable Court on May 15, 2008.

STATEMENT OF CONSIDERATIONS REGARDING GRANTING OF WRIT

Respondent respectfully submits that the decision of the Louisiana Supreme Court, to the extent it denied plaintiff's Application for Writ of Certiorari and allowed to stand the Louisiana First Circuit Court of Appeal's ruling that FMLA's self-care provision is unconstitutional as applied to the states, is consistent with the decisions of every United States court of appeal that has decided the legal issue, except one. This factor weighs heavily against granting the writ of certiorari.

Respondent agrees with Petitioner that the legal question at issue in these proceedings, *i.e.*, whether Congress exceeded its authority in passing the self-care provision of the FMLA, is an important question of federal law that has not been, but should be, settled by this Court. This factor militates toward granting the writ.

ARGUMENT

I. CONGRESS DID NOT ABROGATE ELEVENTH AMENDMENT IMMUNITY AGAINST CLAIMS ASSERTED UNDER THE SELF-CARE PROVISION OF FMLA

The State of Louisiana is endowed with sovereign immunity. In this regard, the Eleventh Amendment to the United States Constitution provides as follows:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

This Amendment precluding federal court jurisdiction over a suit against a state by a citizen of another state also applies to suits against a state or a state agency by its own citizens.

Unless sovereign immunity has been abrogated by an act of Congress or voluntarily waived by a state, the Eleventh Amendment of the Constitution provides immunity to the state from federal court lawsuits brought by private persons. *Hughes v. Savell*, 902 F.2d 376, 377-78 (5th Cir. 1990) (citing *Penhurst State School & Hosp. v. Halderman*, 104 S.Ct. 900, 908 (1984)). Pursuant to statute, Louisiana has not waived its Eleventh Amendment immunity. *Cozzo v. Tangipahoa Parish-Council-President Government*, 279 F.3d 273, 281 (5th Cir. 2002); *Jenkins v. Lee*, 1999 WL 97931 (E.D. La. Feb. 17, 1999).

Whether sovereign immunity also applies to the Louisiana Department of the Military requires some analysis. The Eleventh Amendment bars lawsuits against a state agency if the agency is so closely connected to the state that the state itself is the party in interest. *See Vogt v. Bd. of Comm'rs of the Orleans Levee District*, 294 F.3d 684 (5th Cir. 2002). The courts have previously analyzed the status of state military departments and have determined that the

military department is protected by the Eleventh Amendment from lawsuits brought in federal court. *See Bartley v. U.S. Dept. of Army*, 221 F.Supp.2d 934, 951 (C.D. Ill. 2002) (Illinois Division of Military Affairs); *Moore v. Penn. Dept. Military & Veterans Affairs,* 216 F.Supp.2d 446, 454 (E.D. Pa. 2002) (Pennsylvania Department of Military and Veterans Affairs); *Jones v. New York State Division of Military and Naval Affairs,* 166 F.3d 45, 49 (2nd Cir. 1999) (Division of Military and Naval Affairs); *Bryant v. Military Dept. of State of Miss.,* 381 F.Supp.2d 586, 591 (S.D. Miss. 2005) (Military Department through the National Guard). *See also Day v. Massachusetts Air Nat. Guard,* 167 F.3d 678, 686 (1st Cir. 1999) (immunity extended to the National Guard); *Meadows v. State of Ind.,* 854 F.2d 1068, 1069 (7th Cir. 1988); *Hefley v. Textron, Inc.,* 713 F.2d 1487, 1493 (10th Cir. 1983); *Introini v. South Carolina Nat. Guard,* 828 F.Supp. 391, 392 (D. S.C. 1993); *Roig v. Puerto Rico Nat. Guard,* 47 F.Supp.2d 216, 221 (D. P.R. 1999); *Culbreth v. Ingram,* 389 F.Supp.2d 668, 672 (E.D.N.C. 2005); *Young v. Harmon,* 2003 WL 21918759, *5 (N.D. Ind. May 13, 2003).

By enacting the self-care provision of the FMLA, Congress did not abrogate the states' sovereign immunity from suit. *See Kazmier v. Widmann,* 225 F.3d 519, 524-29 (5th Cir. 2000); *Modica v. Taylor,* 465 F.3d 174, 183-84 (5th Cir. 2006); *Gentry v. Summit Behavioral Healthcare,* 197 Fed.Appx. 434, 437 (6th Cir. 2006); *Touvell v. Ohio Dept. of Mental Retardation and Developmental Disabilities,* 422 F.3d 392,

399-400 (6th Cir. 2005); *Toeller v. Wisconsin Dept. of Corrections,* 461 F.3d 871, 877-80 (7th Cir. 2006); *Miles v. Bellfontaine Habilitation Ctr.,* 481 F.3d 1106 (8th Cir. 2007); *Brockman v. Wyoming Dep't of Family Servs.,* 342 F.3d 1159, 1164-65 & n. 3 (10th Cir. 2003); *Batchelor v. South Florida Water Management Dist.,* 242 Fed.Appx. 652, 653 (11th Cir. 2007); *Garrett v. University of Alabama at Birmingham Bd. of Trustees,* 193 F.3d 1214 (11th Cir. 1999) (self-care provision not a valid abrogation of sovereign immunity). *See also* WRIGHT & MILLER, 4B FEDERAL PRACTICE AND PROCEDURE § 1110 (Supp. 2006); WRIGHT & MILLER, 13 FEDERAL PRACTICE AND PROCEDURE § 3524 (SUPP. 2006). Therefore, the Eleventh Amendment bars plaintiff's FMLA claim against the State of Louisiana.

Petitioner argues that the self-care provision shares the same constitutional fate as the family-care provision of the FMLA, which was upheld by this Honorable Court in *Nevada Department of Human Resources v. Hibbs,* 123 S.Ct. 1972 (2003). In support of this proposition, Petitioner cites the cases of *Bylsma v. Freeman,* 346 F.3d 1324 (11th Cir. 2003), and *Montgomery v. Maryland,* 72 Fed.Appx. 17 (4th Cir. 2003). Petitioner's reliance on these cases is misplaced.

***Bylsma* upheld the *family-care* provision of the FMLA, not the self-care provision.** To be sure, the district court framed the issue before it as follows:

> In this case, the Plaintiff asserts a claim under the FMLA retaliation provision. The

> Plaintiff is, however, claiming that she was retaliated against for having exercised her right to take FMLA leave **to care for *family members*.** Accordingly, this court concludes that the question of the validity of Congress' abrogation of the States' Eleventh Amendment immunity under the retaliation provision is tied to the question of the validity of abrogation of the FMLA provision regarding leave to **care for *family members*.**

Bylsma v. Bailey, supra at 1233 (emphasis added). Lest there be any doubt as to the Eleventh Circuit position on this issue, it recently held:

> The issue we must decide is whether, in the light of *Nevada Department of Human Resources v. Hibbs,* 538 U.S. 721, 123 S.Ct. 1972, 155 L.Ed.2d 953 (2003), our holding in *Garrett v. University of Alabama Board of Trustees,* 193 F.3d 1214, 1219 (11th Cir.1999), *reversed in part on other grounds,* 531 U.S. 356, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001), that Congress did not validly abrogate state sovereign immunity through the self-care provision of the FMLA remains good law. **Batchelor argues that the district court construed *Hibbs* too narrowly by holding that the decision only applied to the family-care provision of the FMLA, 29 U.S.C. § 2612(a)(1)(C). We agree with the district court; our decision in *Garrett*, 193 F.3d at 1219, is controlling.**
>
> * * *

> Under the Eleventh Amendment, a State is immune from suit in federal court without its consent. *Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 100, 104 S.Ct. 900, 908, 79 L.Ed.2d 67 (1984). "Congress may, however, abrogate such immunity in federal court if it makes its intention to abrogate unmistakably clear in the language of the statute and acts pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment." *Hibbs,* 538 U.S. at 726, 123 S.Ct. at 1976. In *Garrett,* we held that Congress was without authority to abrogate the sovereign immunity of the states from complaints under the self-care provision of the FMLA. 193 F.3d at 1219. The Supreme Court, in *Hibbs,* addressed the authority of Congress to abrogate state sovereign immunity for claims arising under only the family-care provision of the FMLA. 538 U.S. at 725-740, 123 S.Ct. at 1976-1984. **Our holding in *Garrett* that Congress is without authority to abrogate state sovereign immunity for claims arising under the self-care provision of the FMLA remains the law of this Circuit.** *See Marte,* 356 F.3d at 1344.

Batchelor v. South Florida Water Management Dist., 242 Fed.Appx. 652, 652-53 (11th Cir. 2007) (emphasis added). *Montgomery*'s lack of persuasive authority was recently noted by the Utah Supreme Court:

> Since the *Hibbs* decision, several courts have been presented with the question of whether

> the self-care provision of the FMLA is constitutional. The vast majority of courts have concluded that although the family-care provisions of the FMLA are valid under *Hibbs*, "the self-care provision of the FMLA is unconstitutional insofar as it purports to abrogate state sovereign immunity." For example, the Sixth, Seventh, and Tenth Circuits have all concluded that, in spite of *Hibbs*, the self-care provision is invalid. The Tenth Circuit noted that "at least seven other circuits have held that either subsection (D) alone or the entire FMLA violates sovereign immunity. Some of these decisions have been overruled by *Hibbs* with respect to subsection (C), but the invalidation of the self-care provisions in subsection (D) stands."
>
> **In fact, it appears that the only case that has held that the self-care provision of the FMLA is valid is the Fourth Circuit's unpublished per curiam decision in *Montgomery v. Maryland*. However, in *Touvell*, in concluding that the self-care provision is invalid, the Sixth Circuit noted that the Fourth Circuit's decision in *Montgomery* "gave no explanation for [its conclusion], and we do not consider it persuasive." We agree.**

Nicholas v. Attorney General, 168 P.3d 809, 811-12 (Utah 2007) (emphasis added).

Eleventh Amendment immunity applies not only to actions brought against a state in federal court but also to certain actions brought in state court. Thus,

where a state has immunity in federal court from an action based on federal law, it enjoys the same immunity in state court. The lead case on this point of law is *Alden v. Maine,* 715 A.2d 172 (Me. 1998), *writ granted,* 119 S.Ct. 443 (1998), *aff'd,* 119 S.Ct. 2240 (1999). In that case, a probation officer brought a Fair Labor Standards Act (FLSA) action against the State of Maine in state court. The superior court dismissed the action on the basis of sovereign immunity, and an appeal was taken. The Supreme Court of Maine affirmed, holding that state sovereign immunity, as reflected in the Eleventh Amendment, protected the state from suit in its own courts:

> *The principal issue before us is whether state sovereign immunity, as reflected in the Eleventh Amendment, protects the State from this federally created cause of action in its own courts.* Alden contends that Congress has abrogated the State's sovereign immunity by enacting the FLSA. We disagree. Although Congress may have intended to subject the states to the overtime provisions of the FLSA, it does not have the necessary power, pursuant to the Constitution, to accomplish this end.
>
> The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. AMEND. XI. "Although the text of the Amendment would

appear to restrict only the Article III diversity jurisdiction of the federal courts, 'we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition which it confirms.'" *Seminole Tribe*, 517 U.S. at 54, 116 S.Ct. 1114 (quoting *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779, 111 S.Ct. 2578, 115 L.Ed.2d 686 (1991)). That presupposition consists of two elements: "that each State is a sovereign entity in our federal system and that '[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.'" *Id.* (quoting *The Federalist No. 81*, at 487 (Alexander Hamilton)) (Clinton Rositer ed. (1961)) (citations omitted).

We have concluded on several occasions that sovereign immunity does protect the State from suit by private parties in its own courts without its consent, even when the cause of action derives from federal law. In *Drake v. Smith*, 390 A.2d 541 (Me. 1978), we considered the question whether the State's enactment of a statutory scheme whereby it became a partner with the federal government in paying medical care costs of certain recipients of federal aid constituted a waiver of state sovereign immunity. We held that because the State had not waived its Eleventh Amendment immunity from suit in federal court, it was not reasonable to conclude that it had waived its sovereign immunity to the same suit in state court. *Id.* at 546.

In *Thiboutot v. State*, 405 A.2d 230 (Me. 1979), *aff'd on other grounds*, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980), we addressed the amenability of the State to suits by private parties for retroactive AFDC benefits pursuant to 42 U.S.C. § 1983. We held that "in the absence of waiver by the state of its sovereign immunity, the state may constitutionally interpose that immunity as a bar to a class action brought in a state court under § 1983." *Id.* at 237. Similarly, in *Jackson v. State*, 544 A.2d 291 (Me. 1988) *cert. denied*, 491 U.S. 904, 109 S.Ct. 3185, 105 L.Ed.2d 694 (1989), addressing the State's amenability to suit under the federal Rehabilitation Act, 29 U.S.C. § 794, we held that "the State may constitutionally interpose its sovereign immunity in state court as a bar to an award of damages under the Rehabilitation Act." *Id.* at 298. Most recently, *Moody v. Commissioner, Dept. of Human Servs.*, 661 A.2d 156 (Me. 1995), concerned the AFDC program and a violation by the Department of Human Services of the due process rights of the plaintiffs. In reaching the conclusion that the State is protected by sovereign immunity from suit in its own courts, we stated: "The Eleventh Amendment to the United States Constitution precludes the federal courts from circumventing the sovereign immunity of the states. Although the Eleventh Amendment is not directly applicable to state courts, the doctrine of sovereign immunity similarly protects the states from actions [in] state courts." *Id.* at 158 n. 3 (citation omitted).

Reading these decisions in combination, it is clear that we have looked to the Eleventh Amendment to define the contours of state sovereign immunity. *If Congress cannot force the states to defend in federal court against claims by private individuals, it similarly cannot force the states to defend in their own courts against these same claims.* In reaching this conclusion, we have found that the Eleventh Amendment and state sovereign immunity are analogous, to the extent that both protect the State from being forced by an act of Congress to defend against a federal cause of action brought by a private individual. To hold otherwise, by concluding that a state, immune from suit in federal court, must defend against that same suit in its own courts, would effectively vitiate the Eleventh Amendment.

The Eleventh Amendment does not explicitly protect the states from suit in their own courts. That does not, however, end the inquiry. . . . The postulate at work here, state sovereign immunity, is a "background principle" that is "embodied in the Eleventh Amendment." (citation omitted). Thus the Eleventh Amendment does not delimit the scope and effect of state sovereign immunity. Rather, it reflects but one aspect of the states' inherent, more sweeping immunity from suits brought by private parties.

A power so basic and profound would be an odd power indeed if it protected the states from suit in the federal courts but provided no comparable protection in their own courts.

> If Congress does not have the power to abrogate state sovereign immunity with respect to federal causes of action brought in federal courts, as the *Seminole Tribe* case clearly held, then that limitation on congressional power may not be circumvented simply by moving to a state court. Accordingly, *we conclude that sovereign immunity protects the State from defending this federal cause of action in its own courts.*

Alden v. Maine, 715 A.2d at 173-75 (emphasis added).

After granting certiorari, this Court affirmed the dismissal of the action and made it quite clear that where a state has immunity in the federal courts from an action based on federal law, it enjoys the same immunity in the state courts:

> We hold that the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts. We decide as well that the State of Maine has not consented to suits for overtime pay and liquidated damages under the FLSA. On these premises we affirm the judgment sustaining dismissal of the suit.
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> We are aware of no constitutional precept that would admit of a congressional power to require state courts to entertain federal suits which are not within the judicial power of the United States and could not be heard in federal courts. . . .

> In light of history, practice, precedent, and the structure of the Constitution, we hold that the States retain immunity from private suit in their own courts, an immunity beyond the congressional power to abrogate by Article I legislation.

119 S.Ct. at 2246 and 2266.

In accordance with these authorities, the Louisiana Department of Military is entitled to Eleventh Amendment immunity for the FMLA claims asserted against it in the present action.

According to Petitioner, even if the Eleventh Amendment does bar his FMLA claims, injunctive relief, including reinstatement and attorney's fees, is nevertheless available to him under FMLA in accordance with *Ex parte Young*.[3] Plaintiff offers no explanation or legal authority as to how any relief can be had under the FMLA when the statute has been declared to be unconstitutional as applied to the states. It would be tautological to hold that Congress exceeded its authority in passing the FMLA, but yet, injunctive relief is nonetheless available under the statute.

Assuming *arguendo* that *Ex parte Young* breathes life into the constitutionally dead FMLA, the *Ex parte Young* exception to the Eleventh Amendment is limited. As the Supreme Court explained, the exception applies only when (1) the suit is against a **state**

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[3] 28 S.Ct. 441 (1908).

official and (2) the plaintiff seeks only prospective injunctive relief (3) in order to end a "**continuing** violation of federal law." *Seminole Tribe of Florida v. Florida,* 116 S.Ct. 1114, 1132 (1996). "Where Congress has prescribed a detailed remedial scheme for the enforcement of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young.*" *Id.* In the present action, suit has not been brought against a state official, nor is there a continuing violation of federal law. Accordingly, the *Ex parte Young* doctrine affords no relief to plaintiff. *See Nelson v. University of Texas at Dallas,* 461 F.Supp.2d 504, 508-09 (N.D. Tex. 2006).

II. LOUISIANA DID NOT WAIVE ITS SOVEREIGN IMMUNITY

Petitioner's most ludicrous argument concerns waiver of sovereign immunity. Petitioner argues that Article XII, § 10(A) of the Louisiana Constitution and LSA-R.S. 13:5106(A) operate as a **waiver** of Eleventh Amendment immunity, such that his FMLA claim is not barred. He notes that while the caselaw uniformly holds that the State of Louisiana has not waived its sovereign immunity to be sued in **federal** court, there is no jurisprudence addressing the waiver of sovereign immunity as to actions brought in **state** court.

Petitioner's argument is deficient on many different levels. First of all, Article XII, § 10(A) of the Louisiana Constitution has absolutely nothing to do

with the Eleventh Amendment – it eliminated the immunity from suit and liability conferred on sovereign bodies under the commonlaw. Secondly, Section 5106 is an **assertion** of sovereign immunity, not a **waiver** of immunity.[4] Thirdly, Section 5106 does not shield the State of Louisiana from suits brought in state court. (To the contrary, the statute mandates that suits against the State be brought in state court).

Petitioner confuses the commonlaw sovereign immunity abolished by Louisiana Constitution Article XII, § 10(A) with the sovereign immunity recognized under the Eleventh Amendment to the United States Constitution. Under the common law, a sovereignty may not be sued. The doctrine of sovereign immunity springs from early English common law where the king was immune from suit by his subjects. It was believed that a king ruled by divine right, hence the idea that "the king can do no wrong." It is also based on the concept that since all rights and laws flow from the sovereign, there can be no legal right or redress against the authority that makes the law on which the very right depends, thus a king could not be held accountable in courts of his own creation. *Schoeffler v. Kempthorne*, 493 F.Supp.2d 805, 813 n. 22 (W.D. La. 2007). Immunity under the Eleventh

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[4] LSA-R.S. 13:5106(A) provides as follows:

No suit against the state or a state agency or political subdivision shall be instituted in any court other than a Louisiana state court.

Amendment, on the other hand, protects states only against suit in federal court.[5]

CONCLUSION

For the reasons set forth above, the ruling for which review is sought in the present proceedings is correct. Accordingly, Respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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[5] Petitioner did not raise his waiver of immunity and *Ex parte Young* arguments until after the Louisiana First Circuit Court of Appeal struck down his FMLA claims. In his opposition memorandum filed in the trial court and in his appellate brief, petitioner's sole argument was that Congress acted within its authority in enacting the FMLA.